

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA

4 v.

17 CR 324 (VEC)

5 THIODORE IGOROVICH GALITSA,

Sentence

6 Defendant.

7 -----x

8 New York, N.Y.
9 March 16, 2018
3:00 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI

12 District Judge

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17 APPEARANCES

18 GEOFFREY S. BERMAN

19 Interim United States Attorney for the
Southern District of New York

20 MICHAEL K. KROUSE

JESSICA GREENWOOD

21 Assistant United States Attorney

22 FEDERAL DEFENDERS OF NEW YORK, INC.

23 Attorneys for Defendant

24 BY: MARTIN S. COHEN
25

1 (Case called)

2 MR. KROUSE: Good afternoon, your Honor. Michael
3 Krouse and Jessica Greenwood for the United States.

4 THE COURT: Good afternoon.

5 MR. COHEN: Good afternoon, your Honor, Martin Cohen
6 from the Federal Defenders on behalf of Mr. Galitsa.

7 THE COURT: Is that your mother who is here today?

8 MR. COHEN: Your Honor, Mr. Galitsa's mother has been
9 unable to come to court because of her caretaking
10 responsibilities for her patient. Carol Angelino, one of his
11 clients, is here. She was also here for part of the trial.

12 THE COURT: I remember. Terrific.

13 Before we proceed to sentencing, the Court is prepared
14 to rule on the defendant's motion for a new trial pursuant to
15 rule 33 and a motion for mistrial that the Court previously
16 reserved on. Does anyone want to say anything more about those
17 issues?

18 MR. KROUSE: No, thank you, your Honor.

19 MR. COHEN: No, your Honor. Thank you.

20 THE COURT: The defendant argues that it was error to
21 permit the government to cross-examine him regarding alle-
22 gations that he stole \$25,000 from a former employer by forging
23 checks. Even if this alleged bad act were admissible pursuant
24 to 608, the defense argues it was error to permit the
25 government to mention that he was arrested in connection with

1 these allegations and on other occasions.

2 The Court disagrees. It was not error to permit the
3 government to cross on these bad acts, and any error from
4 permitting this line of questioning or mention of Mr. Galitsa's
5 prior arrest was harmless. Rule 33 authorizes the Court to set
6 aside a verdict and grant a new trial if the interests of
7 justice so requires. It is appropriate to grant a new trial
8 pursuant to rule 33 if there is a manifest injustice such that
9 there is a real concern that an innocent person may have been
10 convicted.

11 To begin with, the allegations that Mr. Galitsa stole
12 \$25,000 from a former employer were admissible. As the Court
13 ruled in connection with the parties' motions in limine, rule
14 608 permits cross-examination into bad acts that are probative
15 of the witness's character for truthfulness. Mr. Galitsa
16 concedes that. That is in his memo at 17 to 18. But Mr.
17 Galitsa argues that the allegations against him should have
18 been excluded pursuant to rule 403 because the prejudicial
19 impact of the allegations outweighed their probative value.

20 Recent allegations that Mr. Galitsa defrauded his
21 employer were highly probative of Galitsa's credibility. The
22 fact that the charges against Mr. Galitsa were ultimately
23 dropped does not mean the allegations were so unlikely to be
24 true that admitting them was unfairly prejudicial. There was
25 an adequate factual basis for the allegations against Galitsa,

1 including that he was paid an excessive amount for the work
2 done, the checks were cashed out of order, and the victims said
3 that they were stolen.

4 Rule 403 does not require the Court to preclude bad
5 acts that might not be provable beyond a reasonable doubt. By
6 comparison, in the Schwab case cited by Galitsa, the defendant
7 may have been acquitted of charges related to the alleged bad
8 act. The allegations were 18 to 20 years old, and there was no
9 new evidence that the allegations were true. The defendant's
10 real beef is with the Court's timing of ruling on this issue.

11 In pretrial motion practice, the government noted that
12 Mr. Galitsa had a sealed arrest record from July 2014 but that
13 no other information regarding the arrest was available. The
14 Court held that the government could not introduce this arrest
15 record in the event Galitsa testified pending more information.

16 Although the parties ran through the arrest before
17 trial, no information was provided to the Court until a sidebar
18 after Galitsa's direct testimony was completed and immediately
19 before the government's cross. Thus, at the time Galitsa
20 decided to testify, he did not know whether the government
21 would be permitted to cross-examine him regarding these
22 allegations.

23 The Court agrees with the government's admission that
24 best practice would have been to raise the admissibility of
25 these allegations with the Court earlier. Nonetheless, Galitsa

1 cited to no rules of evidence or case law that requires the
2 Court to rule on these issues in advance.

3 At the time Galitsa decided to testify, he and his
4 attorney were aware of the government's further investigation
5 into the issue, that the admissibility of the allegations was
6 unresolved, and that there was a possibility that the
7 government would seek to question him regarding the
8 allegations.

9 The government's failure to reraise the issue in
10 limine was not entirely unreasonable inasmuch as it was not
11 informed that Galitsa would testify until moments before he
12 took the stand. As the Court noted when this issue was
13 discussed at trial, either side could have moved in limine on
14 the issue. The timing of the Court's ruling did not prejudice
15 Galitsa's right to make a fully informed decision whether to
16 testify.

17 Next, Galitsa argues the government improperly
18 mentioned his arrests in 2014 and 2015. The underlying
19 allegations that Galitsa stole from his former employer and
20 shoplifted were fair game under rule 608, but the mere fact
21 that he was arrested was not.

22 Nonetheless, the government's mention of these arrests
23 was not so prejudicial that a new trial is required. The Court
24 instructed the jury to disregard the government's reference to
25 Galitsa's prior arrests and made clear that no inference could

1 be drawn from them. The Court must assume the jury followed
2 those instructions.

3 Most important, there was a veritable avalanche of
4 evidence from which the jury could conclude that Galitsa was
5 guilty. It is not correct to say, as Mr. Galitsa argues, that
6 this case hinged on Mr. Galitsa's credibility. For the jury to
7 accept Mr. Galitsa's alibi, it would have been required to
8 credit his testimony and discredit the testimony of ICE agents
9 who testified to the procedures followed in removing Mr.
10 Galitsa, contemporaneous notes taken by the ICE agents, and ICE
11 records bearing Mr. Galitsa's fingerprints that confirmed his
12 removal, passenger manifests and Ukrainian border records
13 confirming that Mr. Galitsa was on the plane to Ukraine and
14 arrived in Kiev, and bank records showing that Mr. Galitsa's
15 bank card was used in Kiev on the day his flight arrived in
16 Ukraine and that appeared to track Mr. Galitsa's movements as
17 he moved around Eastern Europe before returning to the United
18 States.

19 Moreover, Mr. Galitsa's alibi required the jury to
20 find that the ICE agents were lying and had set Mr. Galitsa
21 loose, a man they had just met at JFK, for no apparent reason
22 and at great personal and professional risk. Thus, to the
23 extent there was any error either in mentioning Mr. Galitsa's
24 arrests or in admitting allegations that he defrauded his
25 former employer, the error was harmless.

1 Mr. Galitsa's motion for a mistrial is denied, and the
2 clerk of court is directed to close the open motion at docket
3 85.

4 With that, I'm prepared to proceed to sentence. Mr.
5 Cohen, have you and your client read the pre-sentence report
6 dated February 2nd?

7 MR. COHEN: Yes, your Honor.

8 THE COURT: Mr. Galitsa, did you read the pre-sentence
9 report?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Did you discuss it with your lawyer?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Are there any objections to the report?

14 MR. COHEN: No, your Honor.

15 THE COURT: The pre-sentence report will be made part
16 of the record in this matter and placed under seal. If an
17 appeal is taken, counsel on appeal may have access to the
18 sealed report without further application to this Court.

19 I received a sentencing submission from the defense
20 dated March 9, 2018, that included letters from Mr. Galitsa's
21 mother, a family friend, and four different clients. I read
22 all the letters. Thank you for your letter.

23 I also received a letter from the government dated
24 March 9, 2018.

25 The next step is the guidelines calculation. Please

1 excuse this. This is going to sound like total gobbledygook.

2 The defendant was convicted after trial of one count
3 of illegal reentry in violation of the immigration laws and one
4 count of making a false statement in violation of 1001. The
5 pre-sentence report reflects a guidelines level of 12, criminal
6 history II, which yields a guideline sentence of 12 to 18
7 months.

8 The government argued that the grouping rules should
9 not apply because the illegal reentry and false statements were
10 years apart and did not have the same victim or plan.
11 Probation rejected the government's argument, and the
12 government did not press it in its sentencing submission.

13 I think it is a close case but that the better view of
14 the guidelines is the one argued by the government. The victim
15 of the false statements in which he accused the ICE agents of
16 letting him go at JFK is the societal interest in ensuring law
17 enforcement receives accurate information which they are
18 collecting information during an investigation. The victim of
19 the illegal reentry is the societal interest in controlling our
20 borders. This case is different from an illegal entrant
21 showing false documents at the border, which it seems to me
22 probation was focusing on, where you would group the two
23 crimes.

24 The Ninth Circuit dealt with this issue in United
25 States v. Gastelum-Almeida, 298 F.3d 1167 (9th Cir. 2002). In

1 that case it determined that although society at large is the
2 victim of both the 1001 charge and the alien smuggling charge,
3 the interests themselves were sufficiently distinct that
4 grouping was not appropriate, using the terminology of 3D1.2A
5 because different victims were involved. For that reason I
6 also think that the counts should not be grouped.

7 I therefore find the correct guidelines calculation to
8 be as follows. For the illegal reentry, the base offense level
9 is set out in 2L1.2, and it's 8. Because this offense was
10 committed after two prior misdemeanor convictions for illegal
11 entry pursuant to 2L1.2(b)(1)(B), it's plus 2. Because Mr.
12 Galitsa obstructed the investigation by producing false tax
13 returns and, in my view, committing perjury at trial. Pursuant
14 to 3C1.1, plus 2. That brings the total to 12.

15 In terms of the false statement, the base offense
16 level is found at 2B1.1, and it's 6. Again an obstruction of
17 justice enhancement is appropriate because he lied at trial.
18 Pursuant to 3C1.1, plus 2, bringing the total to 8.

19 That brings us to the multiple count adjustment.
20 Pursuant to 3D1.4, the highest group gets 1 unit. The next
21 group, which would be the 1001 count, gets 1 unit because it is
22 4 levels or less away. 2 units increase the highest level by
23 2. 12 plus 2 equals 14.

24 In terms of criminal history, Mr. Galitsa has 3
25 criminal history points, 1 for his 2008 conviction for illegal

1 reentry, 1 for his 2011 conviction for illegal reentry, and 1
2 for his 2015 petit larceny conviction. 3 criminal history
3 points puts him at criminal history category II. Level 14,
4 criminal history category II yields a guideline range of 18 to
5 24 months.

6 Let me say that although my calculation is higher than
7 probation, my sentence will be the same under the probation
8 department's calculation as well.

9 Are there any guidelines arguments that I have not
10 addressed or that you would like to be heard on?

11 MR. KROUSE: No. Thank you, your Honor.

12 MR. COHEN: No, your Honor.

13 THE COURT: I don't see a grounds for departure under
14 the guidelines. Would the government like to be heard?

15 MR. KROUSE: Yes, your Honor. The Court is obviously
16 very familiar with this case, so I won't belabor our arguments.
17 The government believes a guidelines sentence is appropriate in
18 this case for all the reasons stated in the government's
19 submission.

20 First, this is the third time that the defendant has
21 illegally reentered the country. He has clearly not been
22 deterred based on his previous arrests for illegal reentry and
23 his convictions. He also then lied repeatedly to agents about
24 not being on this deportation flight. He went to the extreme
25 length of creating false tax returns to that end in order to

1 corroborate these lies.

2 He also, as a result of all those lies, caused the
3 government to expend significant resources investigating
4 whether or not he was on that flight when he plainly was. This
5 subjected the deportation officers to the inconvenience of
6 being investigated, fearing for their own careers, all based on
7 a frankly absurd lie that he continued to press all the way
8 through trial.

9 Then, as the Court alluded to, Mr. Galitsa took the
10 stand in open court, in federal court, swore to tell the truth,
11 and then committed perjury. That perjury was exactly the same
12 lie that he had been pressing this entire time.

13 In light of the blatant dishonesty and blatant
14 disregarded for the law, the government believes that a
15 guideline sentence, a substantial sentence of imprisonment, is
16 appropriate in this case both because of the nature of the
17 offense and the seriousness of the offense, also to deter Mr.
18 Galitsa from further efforts to re-enter the country illegally
19 and further efforts if he is caught reentering the country
20 illegally to then continue to lie in an effort to stay in the
21 country despite his criminal acts.

22 THE COURT: Thank you, Mr. Krouse.

23 Mr. Cohen.

24 MR. COHEN: Thank you very much, your Honor. In
25 sentencing Mr. Galitsa, the Court is going to take into account

1 his background and characteristics along with the nature of
2 this offense. I think the letters to the Court provide some
3 important color for the person that Mr. Galitsa is apart from
4 these offenses.

5 You got the letter from his mom, which is important,
6 but I was struck by the letters from all of the clients that he
7 has. They uniformly describe someone who does not just do
8 great work but who they spent significant amount of time with
9 and was able to do all different types of things and who they
10 have come to know as a person to rely on. They got to see him
11 as a person taking care of his mom, taking care of her
12 patients.

13 I have my doubts sometimes. I can't imagine going to
14 someone's trial and writing a letter on their behalf. I don't
15 know the first thing about them. So I think it is an important
16 piece of who Mr. Galitsa is and his many talents. He is a
17 writer as well and has the capability of doing great things
18 once he is released from incarceration.

19 Even if the Court agreed with our requested sentence,
20 which it probably won't, of a year and a day, it is going to be
21 by far the longest period of time that Mr. Galitsa has been
22 incarcerated. The MCC and MDC are not easy places to be, but
23 we are going to ask the Court to allow him to stay there. Most
24 likely he will be designated to Moshannon Valley, which is
25 where all of the people who aren't in the country legally tend

1 to go after they are sentenced here.

2 THE COURT: Where is that?

3 MR. COHEN: That is in the recesses of Pennsylvania,
4 pretty difficult to get to. Whatever additional time he gets,
5 he is going to be isolated, he is not going to be visited by
6 anyone, and it is going to be pretty much pure punishment.
7 That is a sentencing purpose, but there are other purposes as
8 well as, as the Court is well familiar.

9 This is going to be his own decision. But as we
10 indicated in our papers, Mr. Galitsa intends to seek relief
11 from his removal from the country, so he will be incarcerated
12 for probably a significant period of time on top of that, which
13 is something the Court can take into account.

14 We are certainly not resting our argument on that,
15 although we do think the Court should consider those three
16 months that he is not going to get credit for when he was
17 incarcerated between his arrest and the end of April and his
18 release on bail in August because, as the Court remembers, he
19 was nominally in ICE custody.

20 Mr. Galitsa is a very complicated person. The
21 government has brought out the bad things on the ledger. I
22 hope in our submission we have brought out the good. The Court
23 needs to consider both. On balance, I think Mr. Galitsa has a
24 lot to offer the world. He is certainly an important person to
25 his family and his friends and his clients. So I urge the

1 Court to take all of those things into consideration in
2 sentencing Mr. Galitsa.

3 Thank you very much, your Honor.

4 THE COURT: Thank you, Mr. Cohen.

5 Mr. Galitsa, would you like to be heard?

6 THE DEFENDANT: Thank you, your Honor, no.

7 THE COURT: Mr. Galitsa, federal law requires me to
8 consider the nature and the circumstances of the offense and
9 the history and characteristics of the defendant. I am
10 required to impose a sentence that is reasonable and no greater
11 than necessary to accomplish the goals of sentencing. In this
12 case the crime, to me, is a sad one. No matter how someone
13 views the immigration laws, it is sad to put someone in jail
14 who just wants to live in the United States.

15 In terms of the history and characteristics of the
16 defendant, Mr. Galitsa has been far from a model immigrant.
17 Putting aside the burglary when he was very young, he has
18 engaged in a series of petty and some more than petty offenses
19 while in this country. Not counting the alleged robbery from
20 the old man with Parkinson's, as to which I find the evidence
21 somewhat equivocal, he was convicted of petty theft from Home
22 Depot. That was after trial.

23 While the petty theft is unacceptable, there clearly
24 is another side to Mr. Galitsa. I take to heart the letters I
25 received from his clients, who stress what a good worker he is.

1 I know good handymen are hard softened, and it sounds to me Mr.
2 Galitsa was in fact a good handyman. I would also note that
3 unlike many defendants that we all see in this courthouse every
4 day, Mr. Galitsa has skills and appears to have always had
5 gainful employment while he was in the United States, something
6 that I cannot say of many defendants that I sentence.

7 I have considered all of the sentencing factors,
8 including the history and characteristics of the defendant.

9 In terms of the seriousness of the defense, reentry is
10 not the most serious of all offenses. It happens all the time.
11 But lying to the ICE agents and casting a shadow over the
12 agents who deported you, Mr. Galitsa is a serious crime. Your
13 lying, whether you knew this or not, seriously upset those
14 people' careers, and it took ICE and the government a long time
15 to unravel what happened here. You doubled down on the lie
16 with no concern about the agents. You falsified tax returns.
17 There is no question in my mind that you lied on the stand
18 about what happened. All of that adds up to a more serious
19 offense.

20 I have considered the need to promote respect for the
21 law. I have serious doubts that Mr. Galitsa has respect for
22 the law. From the petty offenses to the more serious, Mr.
23 Galitsa seemed to be most concerned about Mr. Galitsa.

24 I have considered the need to impose just punishment
25 while avoiding unwarranted disparities between similarly

1 situated defendants. As a general rule, illegal reentry, at
2 least as of now, does not carry a very stiff sentence across
3 the country.

4 The statistics I have found, which are probably not
5 complete and they tend to be a little bit old, show that the
6 average sentence for illegal reentry is 18 months and the
7 median is 12 months. That said, Mr. Galitsa is somewhat
8 outside the heartland both because of the numbers of times he
9 has reentered the country and because of his decision to lie
10 when he got caught.

11 I have considered the need to deter criminal conduct.
12 This is to me in this case the most important of all factors.
13 Mr. Galitsa, deterrence under U.S. law has two elements. It
14 has what is called general deterrence and specific deterrence.
15 General deterrence is how do we deter society at large from
16 committing crimes. For illegal reentry, it would be how do we
17 deter generally people from illegally reentering the country
18 that they have been once removed. Specific deterrence is how
19 do we deter you.

20 In terms of general deterrence, I have no illusions
21 that no matter what I do here, it is not going to have any
22 impact on people who want to re-enter the country. I know
23 that. I am more concerned about specific deterrence. Mr.
24 Galitsa, I am sympathetic that you want to live in the United
25 States. This is the best place in the world to live. I'm

1 sympathetic that you don't want to live in the Ukraine. Your
2 mother lives here. I get it that you want to be here.

3 You cannot come back to the country. You cannot
4 illegally enter this country. The sentence has to be long
5 enough for you to understand that you don't want to return to
6 the States because you don't want to risk being caught again
7 and going back to jail again. You've got to stay in the
8 Ukraine or wherever, but you can't re-enter this country.

9 In terms of protection of the public and the need to
10 provide the defendant with educational or vocational training,
11 I don't find those to be relevant factors here at all. Again,
12 aside from petty crimes, I don't see Mr. Galitsa as a major
13 threat to society, and he actually has a lot of skills.

14 While my sentences are rarely within the guideline
15 range, in this case I find that the guideline range is just
16 about right, whether it was 12 to 18 months or 15 to 21 months
17 or the guideline range which I found was relevant, which was 18
18 to 24 months. I have considered the 3 months that Mr. Galitsa
19 spent in ICE custody that he is not going to get credit for.

20 Taking all that into account, I am going to sentence
21 the defendant to the custody of the Attorney General for a
22 period of 15 months on Counts One and Two concurrent to each
23 other, to be followed by 2 years of supervised release on
24 Counts One and Two, also concurrent to each other.

25 Because the guideline range is 18 months, this is

1 actually a slight downward variance from the guideline range
2 that I find is applicable to this case. Although I'm
3 downwardly departing, Mr. Galitsa, please let me tell you again
4 you can't come back to the country. I know that you want to
5 and I appreciate that you want to, but you can't.

6 I am not imposing a fine because I find that there is
7 no ability to pay a fine.

8 There are mandatory conditions of supervised release.
9 I am imposing a term of supervised release in the off chance
10 that you are actually paroled into the country or that they
11 grant your asylum request and you are allowed to stay. If so,
12 you will be under supervised release.

13 The terms of supervised release are that you may not
14 commit another crime, you cannot illegally possess a controlled
15 substance, you cannot possess a firearm or other destructive
16 device. I am suspending the mandatory drug testing condition
17 because the defendant poses a low risk of substance abuse.

18 In addition to the standard conditions of supervision,
19 I am imposing the following special condition. Mr. Galitsa
20 must obey the immigration laws and cooperate with the
21 immigration authorities. In the event you are released, Mr.
22 Galitsa, you must report to the nearest probation office within
23 72 hours of release, and you will be supervised by the district
24 of residence.

25 There is no forfeiture or restitution in this case. I

1 must impose a special assessment of \$200.

2 Mr. Cohen, do you have any request on designation?

3 MR. COHEN: Yes, your Honor. Although we expect that
4 he will end up in Moshannon Valley, we would respectfully
5 request that the Court recommend that Mr. Galitsa be allowed to
6 remain at the MDC to facilitate family visitation.

7 THE COURT: Do you actually request MDC, not MCC or
8 MDC?

9 MR. COHEN: MDC, your Honor.

10 THE COURT: Ms. Galitsa, I will make the request that
11 you be designated to MDC. I don't have any of any control over
12 it, but I will make the request.

13 MR. COHEN: Thank you, your Honor.

14 THE COURT: Mr. Galitsa, you have the right to appeal
15 your conviction and sentence. If you are unable to pay the
16 costs of an appeal, you may apply for leave to appeal in forma
17 pauperis. The notice of appeal must be filed within 14 days of
18 the judgment of conviction.

19 Anything further? Ms. Greenwood?

20 MS. GREENWOOD: Not from the government.

21 THE COURT: Mr. Cohen?

22 MR. COHEN: No, your Honor. Thank you very much.

23 THE COURT: Mr. Galitsa, good luck.

24 (Adjourned)
25